

**TESTIMONY OF WADE HENDERSON  
BEFORE THE UNITED STATES SENTENCING COMMISSION**

February 25, 2002

Good afternoon. I am Wade Henderson, Executive Director of the Leadership Conference on Civil Rights. I am pleased to appear before you today on behalf of the Leadership Conference to urge that the Sentencing Commission take aggressive action to remedy racial disparities in federal drug sentencing.

The Leadership Conference on Civil Rights (LCCR) is the nation's oldest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, LCCR works in support of policies that further the goal of equality under law. Today the LCCR consists of over 180 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. It is a privilege to represent the civil and human rights community in addressing the Commission today.

The Commission has sought public input on a number of proposed guideline amendments, and has also posed several "Issues for Comment." My testimony will address one of these issues: whether the threshold quantities of crack cocaine and powder cocaine that trigger longer sentences under the guidelines and statutes should be revised. This matter touches on civil rights concerns of paramount importance to our coalition.

The well-known 100-to-1 crack-powder ratio in federal law is one of the most visible manifestations of racial disparity in the criminal justice system. The civil rights community was bitterly disappointed by Congress' rejection of the Commission's 1995 proposal to eliminate the disparity, and we have grown increasingly frustrated by the failure of federal authorities to address the subject since.

Recent statistics compiled by the Sentencing Commission show that the problem relates not just to the unjustified differences between crack and powder cocaine penalties. Rather, *minorities are now disproportionately subject to the harsh penalties for both types of cocaine.* The issue is no longer just the "ratio" between crack and powder, although that remains a serious concern. The issue is that minorities are almost exclusively targeted for all federal cocaine arrests, and then find themselves in a mechanical sentencing system that results in unacceptably high minority incarceration rates.

In my testimony today I will briefly explain the civil rights context in which this issue arises. I will then turn to the specific issue of federal cocaine penalties and strongly urge the Commission to adopt significant changes to the relevant sentencing guidelines and to propose similar changes to the corresponding statutes.

## RACIAL DISPARITIES IN STATE AND FEDERAL CRIMINAL JUSTICE SYSTEMS

The federal sentencing rules for crack and powder cocaine do not exist in a vacuum. Instead, this glaring inequity is part of a pattern of disparities that threatens the credibility of the criminal justice system in minority communities.

Two years ago LCCR, in conjunction with the Leadership Conference Education Fund, released a policy report entitled Justice on Trial: Racial Disparities in the American Criminal Justice System.<sup>\*</sup> The Report examined inequities in the enforcement of state and federal criminal laws, and devoted substantial attention to the issue of drug sentencing. We concluded that the criminal justice system is beset by massive unfairness, and that both the reality and the perception of this unfairness have disastrous consequences for minority communities and for the criminal justice system itself.

The report detailed how unequal treatment of minorities characterizes every stage of the process. Black and Hispanic Americans, and other minority groups as well, are victimized by disproportionate targeting and unfair treatment by police and other front-line law enforcement agents; by racially skewed charging and plea bargaining decisions of prosecutors; by harsh mandatory sentencing laws; and by the failure of judges, elected officials and other criminal justice policy makers to redress these problems.

These disparities are unjustified. The vast majority of blacks and Hispanics are law-abiding citizens and law enforcement tactics that assume otherwise are unfair and intolerable. As Representative John Lewis (D-GA) says in the foreword to Justice on Trial:

“...the unequal treatment of minorities at every stage of the criminal justice system perpetuates the stereotype that minorities commit more crimes. This perception helps fuel racial profiling and a vicious cycle that affects both innocent white and minority citizens. The reality is that the majority of crimes are not committed by minorities and most minorities are not criminals.”

Our report discussed the consequences of these policies in detail. Consider the following:

- Almost one in three black males aged 20-29 on any given day is under some form of criminal supervision - either in prison or jail, or on probation or parole.
- A black male born in 1991 has a one in three chance of spending time in prison at some point in his life. A Hispanic male born in 1991 has a one in six chance of spending time in prison.

- There are more young black men under criminal supervision than there are in college. For every one black male who graduates from college, 100 black males are arrested.

In particular, the mandatory sentencing laws enacted by Congress in the mid-1980's have led to racial injustice. These laws deprive judges of their traditional discretion to tailor a sentence based on the culpability of the defendant and the seriousness of the crime. Mandatory minimum sentencing laws are not truly mandatory because they provide opportunities for prosecutors to grant exceptions to them. Prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. And under federal law, only the prosecutor may grant a departure from mandatory penalties by certifying that the defendant has provided "substantial assistance" to law enforcement.

Mandatory minimums embody a dangerous combination. They provide the government with unreviewable discretion to target particular defendants or classes of defendants for harsh punishment. But they provide no opportunity for judges to exercise discretion on behalf of defendants in order to check prosecutorial discretion. In effect, they transfer the sentencing decision from impartial judges to adversarial prosecutors, many of whom lack the experience that comes from years on the bench.

I should note that some civil rights groups originally supported mandatory sentencing as an antidote to racial disparities in sentencing. But the evidence is clear that minorities fare worse under mandatory sentencing laws than they did under a system with more judicial discretion. By depriving judges of the ultimate authority to impose fair sentences, mandatory sentencing laws put sentencing on auto-pilot. Discretionary decisions of law enforcement agents and prosecutors engaged in what Justice Cardozo called "the competitive enterprise of ferreting out crime" are more likely to disadvantage minorities than judicial discretion.

The effect of current sentencing policies, including mandatory minimum sentencing laws, has been dramatic. In 1972, the populations of federal and state prisons combined were approximately 200,000. By 1997 the prison population had increased 500 percent to 1.2 million. Similar developments at the local level led to an increase in the jail population from 130,000 to 567,000. There are now some two million people in federal and state prisons and local jails.

This undue reliance on imprisonment results in serious racial disparities. Incarceration rates for minorities are far out of proportion to their percentage of the U.S. population.

As the overall prison population has increased, so too has the percentage of minority Americans as a proportion of the overall prison population. From 1970 to 1984, whites comprised about 60 percent of those admitted to state and federal facilities, and blacks around 40 percent. By 1991, these ratios had reversed, with blacks comprising 54 of prison admissions versus 42 percent for whites. Other minority groups have also been affected by this trend: Hispanics represent the fastest growing category of prisoners, having grown 219 percent between 1985 and 1995.

The increase in minority incarceration is attributable almost exclusively to drug law enforcement. While blacks constitute about 12 percent of the population, they constitute 38 percent of all drug arrestees. Much of this discrepancy can be traced to practices such as racial profiling. The assumption that minorities are more likely to commit drug crimes and that most minorities commit such crimes prompts a disproportionate number of minority arrests. Drug arrests are easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods. Whites commit drug crimes too, but police enforcement strategies do not focus on the settings where those crimes occur.

The fact that minorities are disproportionately disadvantaged by drug sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than whites. According to federal health statistics, drug use rates per capita among minority and white Americans are similar. Given the Nation's demographics, this means that many more whites use drugs than do minorities. Moreover, studies suggest that drug users tend to purchase their drugs from sellers of their own race.

Blacks are not only targeted for drug arrests. They are also 59 percent of those convicted of drug offenses and, because they are less likely to strike a favorable plea bargain with a prosecutor, 74 percent of those sentenced to prison for a drug offense. Thus, blacks are disproportionately subject to the drug sentencing regimes adopted by Congress and state legislatures. And these sentencing regimes, across all levels of government, increasingly provide for more and longer prison sentences for drug offenders. Mandatory minimum sentencing laws result in the extended incarceration of non-violent offenders who, in many cases, are merely drug addicts or low-level functionaries in the drug trade.

In the Justice on Trial report, we urged that mandatory minimum sentencing laws be repealed. These laws are engines of racial injustice, and their repeal would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself. We also urged that the crack/powder cocaine disparity be eliminated. Few policies have contributed more to minority cynicism about the war on drugs, for reasons I will now explain.

## II. CRACK COCAINE AND POWDER COCAINE

Much of the racial discrepancy at the federal level is the result of mandatory sentencing laws for drug offenses, and the drug sentencing guidelines that track the mandatory minimums. These laws were mostly enacted by Congress in 1986 in a wave of racially-tinged media hysteria. We do not contend that Congress was motivated by racial animus in enacting these laws, but race was a subtext of the congressional debate, especially in the uniquely harsh penalties assigned to crack cocaine.

While Congress has dictated lengthy mandatory imprisonment for most drug crimes, crack cocaine was unjustifiably singled out for special rules. As the Commission well knows, federal law imposes a mandatory 5-year federal prison sentence on anyone convicted of selling 5 grams or more of crack cocaine, and a 10-year mandatory sentence for selling 50 grams or more of crack. But in order to receive the same mandatory 5- and 10-year sentences for selling powder cocaine, a defendant must be convicted of selling 500 and 5000 grams of powder cocaine.

There is no scientific or pharmacological evidence to justify treating crack as though it were 100 times more dangerous than powder cocaine. The Commission found as much in 1995 and the updated scientific testimony before the Commission today confirms this fact. I incorporate by reference my June 29, 1995 statement before the House Crime Subcommittee on this subject which catalogued the scientific evidence against a 100-to-1 ratio.

Nor is there anything special about the crack cocaine market to justify these differences. Rates of crack use, which have never exceeded rates of powder cocaine use, have remained stable for over a decade. At the same time, the number of street level crack dealers charged in federal court has climbed from 48% to 66% of all crack defendants while the number of importers, leaders and supervisors has fallen; federal agents catch smaller fish these days. And according to Commission statistics the crack market is decidedly less violent than it was several years ago - well less than half of the crack cases involved a weapon and only 8% of the cases involved actual violence.

So whatever anecdotes and stereotypes caused Congress to treat crack cases so harshly in 1986 are no longer valid, if they ever were. Violent crack dealers should be punished for their violence; non-violent crack dealers should not be punished on the false assumption that all crack dealers are violent.

Blacks and whites convicted of federal powder cocaine offenses go to jail for approximately the same length of time; so too do blacks and whites

convicted of crack cocaine offenses. The problem is that few whites are prosecuted for crack *or* powder offenses in federal court, and are instead prosecuted in state systems that mostly do not impose separately calibrated penalties for crack offenses.

The Commission's most recent statistics on this subject are illuminating. In fiscal year 2000, *93.7% of those convicted for federal crack distribution offenses were black or Hispanic and only 5.6% were white.* That shocking figure has not changed much over the past decade.

But the racial makeup of powder cocaine defendants has shifted in recent years. In 1992, almost one third (32%) of those convicted of federal powder cocaine distribution offenses were white, while 27% were black and 39% were Hispanic. By 2000 the percentage of whites powder cocaine defendants had dropped to 17.8% while the percentage of black powder cocaine defendants had increased to 30.5% and the percentage of Hispanic powder cocaine defendants had increased to 50.8%. In sum, *81% of the federal powder cocaine defendants were minorities.*

Thus, the problem of racial disparity has worsened and become more deeply ingrained since the early 1990's. The unjustifiably harsh penalties for crack offenses still fall disproportionately - indeed almost exclusively - on black defendants. But now, unlike ten years ago, the somewhat more moderate but still very harsh penalties for powder cocaine offenses fall disproportionately on minority defendants (both black and Hispanic) as well. So the massive weight of federal enforcement against cocaine distribution falls almost exclusively on minorities: *93% of all crack defendants and 81% of all powder defendants.*

Returning to the more general points I made earlier about drug law enforcement, such an imbalanced focus on minorities is not justified by what we know about the racial make-up of cocaine users or cocaine sellers. Instead, these disturbing statistics appear to result from racially disparate enforcement strategies and charging decisions in cocaine cases. Minorities are disproportionately arrested for cocaine offenses, disproportionately charged in federal court and then sentenced under especially harsh statutes and guidelines for these offenses.

Three policy imperatives emerge from these statistics. First, *the threshold quantities for crack cocaine should be raised substantially*. Crack sentences must be brought into line. While powder cocaine sentences are themselves too harsh and mechanical, there is certainly no reason why crack cocaine sentences should automatically be so much higher than powder cocaine sentences.

Second, *powder cocaine sentences should under no circumstances be raised*. Now that defendants charged with powder cocaine offenses are predominantly (over 80%) minorities as well, it would only exacerbate overall racial disparity further if powder sentences were raised. At a moment when the Commission is seeking to moderate the sentences for lower-level drug offenders, there is no reason to lower the threshold quantities for powder cocaine or any other drug, since doing so simply expands the scope of the penalty to include lower level dealers.

Third, *with the Commission's assistance Congress should immediately review the interaction of mandatory minimum drug sentencing laws and the tactics and priorities of federal law enforcement agencies*. In tandem, these policies result in catastrophically unhealthy rates of minority incarceration with untold adverse consequences for minority communities.

In 1995, the Commission recommended to Congress that the drug statutes and sentencing guidelines be altered to eliminate the differences in crack and cocaine sentencing thresholds. We were proud to support the Commission's proposal and we regret that Congress rejected it. We continue to believe that the threshold quantities for these two drugs should be equalized. We will continue to urge Congress to adopt that change.

But we understand that in the law rejected the 1995 proposal, Congress limited the Commission's ability to propose a 1-to-1 ratio. *We therefore urge the Commission to adjust the crack threshold so that it is as close to the powder threshold as feasible, consistent with scientific evidence, without raising the powder threshold*.

The failure of Congress to adopt the Commission's recommendations or otherwise address this subject results in perpetuation of a sentencing structure that every observer believes is irrational, and that many minorities view as racist. Few policies have contributed more to minority cynicism about law enforcement. If anti-drug efforts are to have any credibility, especially in minority communities, these penalties must be significantly revised.

Such a change in federal law would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

## CONCLUSION

The Leadership Conference on Civil Rights would welcome the opportunity to work with this Commission to rationalize drug sentencing laws and practices. Such criminal justice reforms are a civil rights challenge that can no longer be ignored.